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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 683

CITIZENS CASUALTY COMPANY OF NEW YORK, a corporation,
Petitioner,

VERSUS

L. C. JONES TRUCKING COMPANY, INC., and/or L. C. JONES, and/or L. C. JONES TRUCK CO., and NATIONAL SURETY CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DUKE DUVALL,
Liberty Bank Building,
Oklahoma City 2, Oklahoma,
Counsel for Petitioner.

Of Counsel:
DUDLEY, DUVALL & DUDLEY,
Liberty Bank Building,
Oklahoma City 2, Oklahoma.

January, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8780

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In the
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Citizens Casualty Company of New York, a corporation, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, entered October 18, 1956.

OPINION BELOW

The judgment and opinion of the Court of Appeals is not officially reported, but is set forth in the record at page 3, and is printed in the Appendix hereto. The order of the Court of Appeals denying petitioner's petition for rehearing was dated and filed November 16, 1956.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). The ground on which the jurisdiction of this Court is invoked is as follows:

The Court of Appeals has decided an important state question in conflict with the applicable state law.

QUESTIONS PRESENTED

The Court of Appeals has decided an important state question in conflict with applicable state law and completely failed to take notice of, and held contrary to the controlling decision of the Supreme Court of Oklahoma, *Duke Anderson Drilling Company* v. *Smith*, 193 Okla. 107, 141 P.2d 565. The insurance policy was written in Oklahoma, the residence of the insured Jones, and the law of no other state being relied upon as governing in the trial or in the briefs on appeal, the Oklahoma law is controlling.

The question is important as it involves the extent of coverage of truck liability policies in widespread use and totalling millions of dollars of insurance.

STATEMENT OF THE CASE

The Issues

In this declaratory judgment action, the crucial issues are whether or not the automobile liability policy issued by petitioner to respondent Jones covered the subject accident; or whether such accident was covered by the con-

tractor's liability policy issued by respondent National Surety Corporation; or whether both policies covered.

Petitioner seeks an adjudication of noncoverage of its automobile liability policy on the grounds that the gin pole equipped truck involved in the subject accident was being used by Jones at the time of the accident in Jones' business of "rigging up oil well derricks" as a mobile crane, and not as an automobile or truck for the "transportation of merchandise" as that term is used in the common speech of men. Petitioner's policy provides coverage "only for the transportation of merchandise."

The trial judge held that petitioner's policy did cover. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the trial court's decision.

The Facts

Jones has two types of operations. It is and was a common carrier of oil field supplies and equipment, operating under authority from the Interstate Commerce Commission and the respective Public Service Commissions of the states in which it operates, including Oklahoma and Colorado. Its business consisted of two types:

(1) Transportation of freight under such certificates, for which freight charges were made on the basis of so much per hundredweight per mile, as prescribed by tariffs on file with the Interstate Commerce Commission and Public Service Commissions.

(2) The operation of rigging up oil well rigs and derricks and tearing them down, for which charges were made on an hourly basis.

The accident occurred on Monday, June 15, 1953, at an oil and gas lease being drilled by the oil well drilling contracting firm of Kiespert and Schoaff, near Sterling, Colorado.

Previous to the date of the accident, the drilling rig in question had been owned by Mid-Continent Supply Company which contracted with Jones to transport the rig to the consignor, Kiespert and Schoaff, at the lease in Colorado, under the usual bill of lading (R. 40). Mid-Continent, as consignor, paid these freight charges. The transportation and delivery of the rig was entirely completed before the date of the accident and the beginning of the rigging up operations during which the accident occurred (R. 40-43).

After this transportation was completed for Mid-Continent, when Kiespert and Schoaff got ready to rig up, they ordered the rigging up trucks and work from Jones. This work was paid for by Kiespert and Schoaff, and Mid-Continent had nothing to do with it (R. 40-43, 109).

The truck involved in the accident was an oil field "rig-up" truck, equipped with gin poles, sometimes referred to as an A-frame and a winch, and winch line equipment. A picture of this vehicle involved in the accident appears as Exhibit 6 (R. 127). Mills was the operator of the truck.

About 7:00 o'clock in the morning, Max Nolen, Jones' Superintendent, sent Mills out to the lease with instructions to perform the rigging up operations on the derrick and rig on the Kiespert and Schoaff lease. In the rigging

up operations, the rig-up truck, the winch line and gin poles were used to lift and place in position various parts of the rig, such as catwalk, pipe racks, pipe, kelly, and other parts comprising the rig (R. 76). In other words, the gin pole truck is used as a mobile derrick or crane and its function is primarily lifting and putting the various parts in place. The work could be equally as well performed by a crawler tractor with a mast or boom on it, or other type of portable or mobile crane.

On the date of the accident, the truck driven by Mills was not used to transport anything (R. 76), and it was not ordinarily used for transportation of freight anyway, because "a truck with a rig-up bed like that is more or less used in the field and it's—it's so much heavier they can't haul much load." On the date of the accident, and before its occurrence, Mills had done no work "other than using the gin pole equipment and winch line and winch for setting up the rig" (R. 77).

He got to the lease around 7:00 or 8:00 o'clock, the accident happened about 2:00 p.m., and the job was completed at 4:00 p.m., when Mills returned to camp and checked in with Max Nolen (R. 77, 80-82).

The undisputed evidence is that the accident happened in this manner (R. 77-80, 114-115). The rigging up process was going on. Mills was directed by one of the contractors or their employees to pick up the kelly which was lying on the ground, and to put it on the pipe rack which, as customary, was located alongside the derrick floor. The kelly is 40 feet long and weighs some 4,000 pounds. It is

the device to which the drill pipe is attached (R. 112). It is square and is run through the square hole in the rotary table and the turning of the table turns the joint and revolves the drill pipe. Placing this pipe in the rack and the pipe itself by winch equipment is part of the rig-up operations (R. 112-114).

After Mills had picked up the kelly from the ground with his winch line and power winch equipment on the truck and raised it some several feet off the ground, he started forward for the purpose of placing it in the pipe rack. When he picked up the kelly and started to place it on the pipe rack, it came loose from the winch line, falling to the ground and pinning the leg of an employee of Kiespert and Schoaff under it so that this 4,000-pound kelly, in striking his leg, was with such severity as to cause its amputation. The injured employee's name is Lee B. Marshall.

In August, 1954, he filed suit against Jones in a Texas court, for damages for personal injuries he sustained in the accident on June 15, 1953. It was after this that Jones gave petitioner the first notice of the accident—a delay of some 14 months. Jones gave notice to petitioner in August, 1954. Thereafter, petitioner took a nonwaiver agreement from Jones which was introduced in evidence as petitioner's Exhibit 1 (R. 121), and proceeded to defend the action until the coverage question could be determined. This declaratory judgment action was then brought for the purpose of securing such determination.

Prior to the disposition of the case below, petitioner, upon application to and order of the trial court, settled and

paid to the injured party the sum of $49,000.00, and all rights were reserved to all parties herein (R. 22-26), and such settlement was without prejudice to their respective contentions.

REASONS FOR GRANTING THE WRIT

Point I.

The Court of Appeals completely failed to take notice of and held contrary the controlling decision of the Oklahoma Supreme Court of *Duke Anderson Drilling Company* v. *Smith*, 193 Okla. 107, 141 P.2d 565.

At the outset, we wish to stress that respondent Jones was engaged in two distinct types of operations, although related, and both of which are frequently engaged in by oil field carriers, namely: (1) That of the transportation of oil field equipment and supplies by truck in intrastate and interstate commerce as a carrier for hire under certificates of convenience and necessity from appropriate Commissions; and (2) that of an oil field contractor in the erection of derricks or drilling rigs.

For this reason, Jones took out two policies of insurance, one an automobile liability policy with petitioner covering the first of these types of business; and a contractor's liability policy with respondent National Surety Corporation covering the second type.

It is for this very reason that petitioner and other insurance companies writing automobile liability risk on oil field truckers are careful to restrict the coverage in the policy to "transportation of merchandise." That was done by petitioner in its policy involved herein. And the Supreme

Court of Oklahoma had before it an example of it being done by another insurance company, Highway Insurance Underwriters, where the identical restriction to coverage of "transportation of merchandise" was construed to prevent coverage of a truck described in the policy when it was being used with its winch line and gin pole equipment to move an object from one place to another. *Duke Anderson Drilling Company* v. *Smith*, 193 Okla. 107, 141 P.2d 565.

This case is strongly in point and was extensively urged in our brief and argument, but is not even mentioned in the opinion. We believe it controls. The policy was written in Oklahoma, the place of residence of the insured Jones, and the law of no other state being relied upon as governing in the trial of the case or in the briefs on appeal.

Petitioner's policy, in Item 5 of the Declarations (R. 4) provides:

> "The automobiles described are and will be used only for transportation of merchandise."

And the insuring clause, as well as even in the endorsements of the policy provide that coverage shall exist only when the vehicles covered are being used by insured "for the purposes stated therein during the policy period."

Now let us compare the language of the *Duke Anderson* case. The declarations there provide, to quote the language of the Court:

> "We observe that the policy of insurance referred to as Exhibit 'A' contains the following provisions which bear directly upon the issue of law presented,

to-wit: 'The automobile will be principally * * * used * * * for transportation and delivery of merchandise'."

We submit that the language of these policies is the same.

Next then let us compare the two factual situations. In the case at bar, the following facts were undisputed and agreed upon:

(1) Jones transported the oil derrick or rig from Oklahoma to Colorado for Mid-Continent, as consignor, to Kiespert & Schoaff, as consignee, to their oil lease near Sterling, Colorado, and complete delivery and unloading made several days prior to the accident. This shipment was made under filed tariffs with charges being so much per hundredweight.

(2) The work being done at the time of the accident was the "rigging up" of the oil derrick or rig, and was paid for on an hourly basis. The trucks were gin pole trucks with winch lines, and carried nothing upon their beds—only the crane equipment, that is, the winch line and poles, being used.

(3) At the time of the accident, a piece of oil field equipment was lifted off the ground by the winch, winch line and gin poles for the purpose of lifting it up into proper place on the oil rig. The truck moved forward about 10 feet for this purpose, and the equipment came loose and fell to the ground causing the injuries.

Going now to the facts in the *Duke Anderson* case, there likewise was no dispute and it was agreed that:

(1) A motor vehicle had run off a road into a ditch.

(2) The insured oil field trucker, Smith, comparable to respondent Jones in the case at bar, was employed to come out to extricate the vehicle and bring it back on the highway with one of Smith's gin pole, winch line trucks.

(3) While the trucker Smith was lifting the other vehicle out of the ditch with the winch, gin poles and winch line and moving it from the ditch out onto the highway, it fell and an accident occurred, resulting in injuries.

The close similarity to the case at bar is at once apparent, in the following respects:

(1) The insured in both instances was an oil field trucker.

(2) In each case the subject insurance policy provided that the insured's vehicle would be "used for transportation of merchandise."

(3) In both cases, the accident giving rise to the litigation and coverage dispute occurred while an object was being lifted by a winch upon the truck, a winch line and gin poles, and moved both upward and horizontally. In the case at bar, from the place where it had been unloaded up to the pipe rack of the rig in the rigging up operations. In the *Duke Anderson* case, from down in the ditch upwards to the level of the highway and over towards the highway.

It would indeed take some fine-spun reasoning to make a distinction between these two cases. In the *Duke Anderson* case, the Supreme Court of Oklahoma held as follows:

> "It is to be observed from the above quoted provisions of the contract that whenever the use was

stated to which the automobile was to be put for which it would be covered under the contract, it was stated to be *the transportation and delivery of merchandise*, or trucking, or commercial, in the sense of the transportation and delivery of merchandise; and in the schedule of Form 'E', on which so much stress is placed, the operation or use is stated to be for the transportation of freight or express or both. *The use out of which the accident and damage arose was not the transportation of merchandise or freight or express, but was the use of the automobile as motive power to extricate a truck from a creek wherein it had fallen due to the collapse of a bridge.* We see nothing in the contract provisions relating to the use to which the automobile is to be put that can reasonably be construed to include the operation or use of the automobile for hire as a wrecker or salvage or tow car" (Emphasis ours).

It is certainly equally logical in the case at bar that the coverage of the "transportation of merchandise" by insured's trucks did not include the renting or hiring out of some of its trucks that were equipped with gin poles and winch and winch line devices for use as mobile cranes in the work of the insured as an oil field rigging up contractor.

Furthermore, it is strikingly noticeable, too, that the Supreme Court of Oklahoma in the *Duke Anderson* case did not hold the operation to constitute "transportation of merchandise" merely because there was movement of an object from one point to another. Yet the Court of Appeals in its opinion, without taking notice of the Oklahoma decision, summarily disposed of petitioner's contention by a brief, two-sentence comment:

> "Transportation is the taking up of persons or property at some point and putting them down at another. If there is a forward movement, distance is not important."

This is not only contrary to said Oklahoma decision, but to the fundamental principle of construction that a word or term in an insurance policy is to be given the popular meaning—not a technical meaning—and not a lexicographer's definition—but how the common man understands it.

This Court has said that the meaning of words in an insurance policy are to be given "their plain, ordinary, and popular sense." *Bergholm* v. *Peoria Life Insurance Company*, 284 U.S. 489, 76 L. Ed. 416; *United States Fidelity & Guaranty Company* v. *Guenther*, 281 U.S. 34, 74 L. Ed. 683.

CONCLUSION

The petition for certiorari ought to be granted.

Respectfully submitted,

DUKE DUVALL,
Liberty Bank Building,
Oklahoma City 2, Oklahoma,
Counsel for Petitioner.

Of Counsel:
DUDLEY, DUVALL & DUDLEY,
Liberty Bank Building,
Oklahoma City 2, Oklahoma.

January, 1957.

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
OCT 18 1956
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5339—SEPTEMBER TERM, 1956

CITIZENS CASUALTY COMPANY OF NEW YORK, a corporation, Appellant, v. L. C. JONES TRUCKING COMPANY, INC., and/or L. C. JONES, and/or L. C. JONES TRUCK CO. and NATIONAL SURETY CORPORATION, Appellees.	Appeal from the United States District Court for the Western District of Oklahoma.

Duke Duvall (Dudley, Duvall & Dudley were with him on the briefs) for appellant.

Gus Rinehart (Butler, Rinehart & Morrison were with him on the brief) for L. C. Jones Trucking Co., Inc.

[APPENDIX]

Clyde Watts (Looney, Watts, Looney, Welch, Hamill & Nichols were with him on the brief) for National Surety Corporation.

Before BRATTON, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

PHILLIPS, Circuit Judge.

Citizens Casualty Company[1] brought a declaratory judgment action against L. C. Jones Trucking Company[2] to determine a controversy with respect to the coverage of an automobile liability insurance policy issued by the Casualty Company to Jones, covering the period from December 1, 1952, to December 1, 1953.

Jones has been engaged in the oil field trucking business since 1913, operating under certificates issued by the Interstate Commerce Commission and the respective Public Service Commissions of the states in which it operates, including Oklahoma and Colorado.

It is customary for such a trucker, who transports oil well drilling equipment, also by means of trucks equipped with gin poles and winches to move the drilling rig and drilling machinery to the point where the drilling rig is to be erected[3] and lift them into place. Ninety per cent of Jones' trucks are equipped with gin poles and winches. The gin poles and winches are used to pick up derrick parts and drilling machinery where they have been deposited near the drilling site, move them to the drilling site and put them in place in the process of erecting the derrick and putting the drilling machinery into operating condition.

Charges made by Jones for the transportation proper of oil field supplies and equipment are based on a per

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[1] Hereinafter called the Casualty Company.
[2] Hereinafter referred to as Jones.
[3] Hereinafter called the drilling site.

hundredweight per mile rate, as prescribed by tariffs on file with the Interstate Commerce Commission and the Public Service Commissions. Charges for moving derrick parts and drilling machinery and putting them in place and in operating condition are based on an hourly rate.

E. H. Gilbert, Jr. is a countersigning agent for the National Surety Company.[4] Prior to December 1, 1952, Jones instructed Gilbert to obtain for him full coverage for liability to third persons arising out of its operations. Gilbert obtained the Casualty Company policy issued to Jones through the Universal Insurance Underwriters and issued to Jones, as countersigning agent, a liability policy of National, intending by the two policies to give Jones complete liability insurance coverage to third persons arising out of Jones' operations. The National policy also covered the period from December 1, 1952, to December 1, 1953.

The Casualty Company policy covered bodily injury liability and property damage liability. The coverage, with respect to bodily injury liability in the Casualty Company policy read:

> "1. * * * To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile, including the loading and unloading thereof."

Such policy recited, "The Automobiles described are and will be used only for Transportation of Merchandise purposes * * *" and that the occupation of Jones was "Trucking—Oil Field & heavy machinery."

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[4] Hereinafter called National.

[APPENDIX]

The National policy covered bodily injury and property damage liability. The coverage provision of the bodily injury provision in the National policy read:

"I. Coverage A—Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the hazards hereinafter defined."

The definition of hazards in the National policy read:

"Division 1. Premises—Operations. The ownership, maintenance or use of the premises, and all operations during the policy period which are necessary or incidental thereto."

The policy contained the following exclusion provision:

"This policy does not apply:

"(a) under division 1 of the Definition of Hazards, * * * (3) automobiles or the loading or unloading thereof except upon premises owned, rented or controlled by the named insured and ways immediately adjoining within the territory, if any, designated in the declarations; * * *."

Prior to June 15, 1953, Keispert and Shoaff Drilling Company[5] had entered into a contract to drill an oil and gas well near Sterling, Colorado. The Drilling Company purchased a drilling rig from the Mid-Continent Supply Company, which contracted with Jones to transport the

[5] Hereinafter called the Drilling Company.

drilling rig and equipment to the Drilling Company at the lease where the well was to be drilled.

Jones transported the drilling rig and equipment to a place near the drilling site. Included in the equipment was a piece of machinery known as a "kelly head." The kelly head was 40 feet long and weighed approximately 4,000 pounds. It is a device to which the drill pipe is attached. It is square and is run through a square hole in the rotary table. The turning of the table turns a joint and revolves the drill pipe. Placing the kelly head and the drill pipe in position is a part of the erection or rig-up operation.

Jones deposited the kelly head at a point about 200 feet northeast of the drilling site.

The Drilling Company contracted with Jones to furnish trucks, equipped with gin poles and winches, and to move the kelly head and other drilling equipment to the drilling site and place them in position in the rig erecting process, where they were to be secured in place by employees of the Drilling Company.

On June 15, 1953, a Jones truck, equipped with gin pole and winch, operated by its employee, Don Mills, was driven to the place where the rig was to be erected. An employee of the Drilling Company directed Mills to pick up, move and place the kelly head in position. The winch line was attached to the kelly head and it was raised several feet from the ground by means of the gin pole and winch. Mills then drove the truck toward the drilling site for the purpose of placing the kelly head in position. While the truck was moving toward the drilling site, the kelly head fell to the ground, pinned the legs of Marshall, an employee of the Drilling Company, under the kelly head, resulting in personal injuries to Marshall.

In August, 1954, Marshall filed suit in a state court in Texas against Jones seeking damages for personal injuries resulting from the accident. The action was removed to

the United States District Court for the Western District of Texas. The Casualty Company defended the Marshall action under a reservation of rights and settled the claim of Marshall without prejudice to the rights of Jones and the Casualty Company.

Mills did not report the accident to Jones and left the employ of Jones one day after the accident. Jones first learned of the accident in August, 1954, and immediately thereafter gave notice of the accident to the Casualty Company.

Gilbert testified that he was familiar with the operations of Jones and knew that Jones' trucks had been and would be used to transport drilling rigs to the place where they were to be used in drilling operations and thereafter lift, move and place them in position in the rig at the drilling site, and that he disclosed such facts to the Universal Insurance Underwriters; that he followed Jones' instructions to procure full coverage for the different risks involved in Jones' operations; that the Casualty Company policy was designed to cover the risks incident to the ownership, use and maintenance of the automobiles by Jones, and the National policy was designed to cover risks incident to operations on premises owned, rented or controlled by Jones; that the premium for the Casualty Company policy was based upon gross earnings of Jones, resulting both from highway transportation and operations at well sites, and that the premium for the National policy was based upon Jones' payroll, excluding truck drivers.

Jones filed an answer and a cross-complaint in the declaratory judgment action. It made National a party defendant to the cross-complaint and sought a judgment against National, adjudicating whether its policy of insurance covered the accident.

The trial court found that no responsible officer or supervisory employee of Jones had actual knowledge of

the accident until the month of August, 1954, after the filing of the Marshall action against Jones, and that Jones notified both the Casualty Company and National of the accident immediately after learning of the same in August, 1954.

The trial court further found that the accident resulted from the use and operation of a truck of Jones, while such truck was being used in connection with and as a part of the business of Jones in trucking oil field and heavy machinery and while such truck was being used for the "transportation of merchandise" within the terms of the Casualty Company's policy.

The trial court further found that the accident arose out of the use and operation of a motor truck of Jones upon premises which were under the supervision and control of the drilling contractor and not upon premises owned, rented or controlled by Jones, and that such accident was not covered by National's policy.

From a judgment adjudging that the Casualty Company, under its policy, was obligated to defend the Marshall action and to defend and indemnify Jones against the claims of Marshall arising out of the accident to the extent of its policy limitations and further adjudging that the accident was not covered by National's policy, the Casualty Company has appealed.

Ordinarily, knowledge of an accident by an employee truck driver will not be imputed to his employer, where the truck driver is not the employer's agent for the purpose of giving such notice.[6]

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[6] *H. G. Hill Co.* v. *Georgia Casualty Co.*, — Tenn. —, 11 S.W.2d 684, 685-686;
Piercy v. *Frankfort M. A. & P. G. Ins. Co.*, 127 N.Y.S. 354, 357;
Mandell v. *Fidelity & Casualty Co.*, — Mass. —, 49 N.E. 110, 112;
Woolverton Fidelity & Casualty Co., 190 N.Y. 41, 82 N.E. 745, 748;
Insurance Law and Practice, Appleman, Vol. 8, § 4742, pp. 134-136.

While the evidence on the issue, with respect to Jones' knowledge of the accident, was conflicting, we cannot say that the court's finding on that issue was clearly erroneous.

We conclude that under the facts and the attendant circumstances Jones was excused from giving notice of the accident until August, 1954.[7]

Transportation is the taking up of persons or property at some point and putting them down at another.[8]

If there is a forward movement, distance is not important.[9]

Here, the Jones truck picked up the kelly head and started a forward movement, for the purpose of moving it to and setting it down in place at the drilling site, and the accident happened during such forward movement. We think, under the facts and attending circumstances, Jones was engaged in transportation of merchandise at the time of the accident. The accident clearly arose out of the operation of the Jones truck.

The accident occurred during operation of the truck, on premises not owned, rented or controlled by Jones, and was not within the coverage of the National policy.

Affirmed.

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[7] *Mandell* v. *Fidelity & Casualty Co.*, — Mass. —, 49 N.E. 110, 112;
Insurance Law and Practice, Appleman, Vol. 8, § 4742, p. 132;
American Fidelity & Casualty Co. v. *Northeast Arkansas B. L.*, — Ark. —, 146 S.W.2d 165, 166;
Public Coal Co. v. *Continental Casualty Co.*, — Pa. —, 10 A.2d 860, 861;
Note, 76 A.L.R., p. 81.

[8] *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 283;
Cunard S. S. Co. v. *Mellon*, 262 U.S. 100, 121, 122;
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[9] *Quinones* v. *United States, supra;*
Dixie Oil Co. v. *United States, supra.*

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In The
Supreme Court of the United States

October Term, 1956

No. 683

CITIZENS CASUALTY COMPANY OF NEW YORK,
a Corporation,
Petitioner,
VERSUS

L. C. JONES TRUCKING COMPANY, INC., and/or L. C. JONES, and/or L. C. JONES TRUCK CO., and NATIONAL SURETY CORPORATION,
Respondents.

BRIEF OF RESPONDENT, NATIONAL SURETY CORPORATION, IN OPPOSITION TO PETITION OF CITIZENS CASUALTY COMPANY OF NEW YORK, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CLYDE J. WATTS,
LOONEY, WATTS,
LOONEY & NICHOLS,
760 First National Building,
Oklahoma City, Oklahoma.
Attorneys for Respondent,
National Surety Corporation.

FEBRUARY, 1957.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 8-2969

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In The
Supreme Court of the United States

October Term, 1956

No. 683

CITIZENS CASUALTY COMPANY OF NEW YORK,
a Corporation,
Petitioner,

VERSUS

L. C. JONES TRUCKING COMPANY, INC., and/or L. C. JONES, and/or L. C. JONES TRUCK CO., and NATIONAL SURETY CORPORATION,
Respondents.

BRIEF OF RESPONDENT, NATIONAL SURETY CORPORATION, IN OPPOSITION TO PETITION OF CITIZENS CASUALTY COMPANY OF NEW YORK, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
TENTH CIRCUIT

PRELIMINARY STATEMENT

Respondent, National Surety Corporation, opposes the petition of Citizens Casualty Company of New York, for writ of *certiorari* to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, entered October 18, 1956, for the following reasons:

(1) That decision is not in conflict with applicable Oklahoma law.

(2) The case of *Duke Anderson Drilling Company* v. *Smith*, 193 Okl. 107, 141 P. 2d 565, asserted by petitioner to be controlling, is merely factually distinguishable from this case, there being no conflict of law involved in the two cases.

STATEMENT OF ISSUES

Through the same agent, petitioner, Citizens Casualty Company, issued an Automobile Liability Insurance Policy, and respondent, National Surety Corporation, issued a Public Liability Insurance Policy, excluding automobiles except upon premises owned, rented, or controlled by the insured.

While the insured, L. C. Jones Trucking Company, was moving a heavy oil field part with a winch truck, an employee of a drilling contractor was injured.

Petitioner sought, by declaratory judgment action, to avoid coverage under its automobile policy upon the ground that (1) the winch truck was not an "automobile" within the terms of its policy but was a "mobile crane", and (2) that the winch truck at the time of the accident was not engaged in the "transportation of merchandise" within the coverage of its policy.

Respondent, National Surety Corporation, denied coverage under its Public Liability Policy upon the ground that the accident involved the use of an "automobile" excluded under terms of its policy when used on premises not owned, rented or controlled by Jones.

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the trial court to the effect that petitioner's policy covered the accident for the reason that it clearly arose out of the operation of the Jones truck while engaged in the transportation of merchandise: that the respondent's policy did not cover the accident for the reason that it occurred during the operation of the Jones truck on premises not owned, rented or controlled by Jones.

STATEMENT OF FACTS

On the date of the accident, the insured, Jones, was under contract with oil and gas drilling contractors, Kiespert & Shoaf, to furnish the truck and driver involved in the accident for the purpose of rigging up a rig upon premises leased by the contractors (R. 29, 40-43, 109). Jones' driver took orders from the drilling contractors in setting up the rig, and they were in complete charge of the premises (R. 30, 78-79). The truck involved was designated a rig-up, or gin-pole truck, being equipped with a winch and gin poles attached to the bed of the

truck (R. 74, 94-95, 110-111). This truck, as are practically all oil-field trucks, was permanently equipped with gin-poles, which are carried on the truck and raised when needed for hoisting or carrying oil-field equipment, using the motor of the truck as power for the winch (R. 110-111). Various heavy objects are moved by attaching them to the gin-pole line and driving the truck to place them (R. 111). Lee B. Marshall, an employee of Kiespert & Shoaf, suffered serious injuries when a kelly-joint, attached to the winch line, fell upon his leg, while the winch truck was being moved toward a pipe rack on the lease (R. 78, 98-99, 114).

Marshall then instituted an action against Jones to recover for his personal injuries, which petitioner proceeded to defend after taking a nonwaiver agreement because of alleged late notice, and subsequently settled without prejudice to the rights of the parties. In the meantime, this declaratory judgment action was instituted to settle the question of coverage.

PETITIONER'S AUTOMOBILE LIABILITY POLICY:

Under its policy, in force on the date of the accident, petitioner agreed:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for dam-

ages * * * because of bodily injury * * * sustained by any person * * * caused by accident and arising out of the ownership, maintenance or use of the automobile, including the loading and unloading thereof."

By definition in the policy and its endorsements, the term "automobile" includes every commercial automobile owned by the insured and used for the purpose of "transportation of merchandise" in the insured's business of "trucking oil field & heavy machinery."

The premium basis established by the gross receipts endorsement was figured from a total of all gross receipts of the insured's business operations.

RESPONDENT'S PUBLIC LIABILITY POLICY

Under this policy, in force on the date of the accident, respondent agreed:

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * because of bodily injury * * * sustained by any person * * * caused by accident and arising out of the hazards hereinafter defined."

Division 1 of hazards is:

"PREMISES—OPERATIONS. The ownership, maintenance or use of the premises, and all operations during the policy period which are necessary or incidental thereto."

By exclusion, the insurer provided that this hazard should not be applicable under the policy as to:

> "* * * automobiles or the loading or unloading thereof except upon premises owned, rented, or controlled by the named insured and ways immediately adjoining within the territory, if any, designated in the declarations * * *."

And the term "automobile" was defined in the policy as:

> "* * * a land motor vehicle, trailer or semi-trailer, providing the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type."

The common agent, who issued both petitioner's automobile liability policy, and respondent's public liability policy, testified in effect and substance (R. 55-61) that he was familiar with all of Jones' operations: that he knew Jones was using some of his trucks for rigging up or lease work (R. 59): that, in issuing both policies to Jones, he was following Jones' instructions to procure coverage for the different risks involved in his operations (R. 58): that petitioner's policy was designed to cover the risks incident to the ownership, use and maintenance

of automobiles, whereas respondent's policy was designed to cover the risks incident to ownership and operation of the premises (R. 57-58); that the premium for petitioner's automobile liability policy was based upon gross earnings of the insured, without distinction between highway hauling and lease work (R. 56), whereas the premium basis for respondent's policy was the payroll, excluding truck drivers (R. 56).

REASONS FOR DENYING THE WRIT

PROPOSITION ONE

The Oklahoma Supreme Court Case of Duke Anderson Drilling Company v. Smith, 193 Okl. 107, 141 P. 2d 565, represents no criterion by which to judge the case at bar, as the two cases are clearly distinguishable on the facts.

Petitioner says that the case of *Duke Anderson Drilling Company* v. *Smith*, 193 Okl. 107, 141 P. 2d 565, is controlling because the policy there, as does its policy, limits the coverage to the use of an automobile or truck in the transportation of merchandise or freight. The Oklahoma Court in that case concluded that the use of the truck as a wrecker to extricate another truck from a creek did not constitute transportation of merchandise within the terms of the policy, and therefore denied coverage. Petitioner, as an analogy to the *Duke Anderson case*, then asserts that the use of Jones' truck as a mobile

crane in the hauling of heavy equipment upon an oil lease in rigging up operations, was not transportation of merchandise within the meaning of its policy. Petitioner then points out that the insured, Jones, was engaged in two distinct types of operations, which are, however, related, namely: (a) Transportation of oil field equipment and supplies by truck; and (2) Oil field contractor engaged in erection of derricks or drilling rigs.

Petitioner, in its zeal to procure an adjudication of non-coverage under its policy, seeks to foist coverage upon this respondent in the face of clearly excepted risks and coverage within clear and concise terms of its public liability policy.

Respondent, National Surety Corporation, expressly and unambiguously contracted with the insured, Jones, to exclude from the coverage of its policy, accidents involving automobiles and occurring on premises not owned, rented or controlled by Jones. It had a lawful right to exclude such coverage. 45 C. J. S. § 834, Page 906, with many cases cited; and responsibility may not be fixed upon National Surety Corporation in the face of clearly excepted risks; *Fidelity and Casualty Company of New York* v. *Reece*, (10 Cir., 1955), 223 F. 2d 114; *Farm Bureau Mut. Automobile Ins. Co.* v. *Daniel*, (4 Cir., 1939), 104 F. 2d 477; *United States Fidelity & Guaranty Co.* v. *Briscoe*, 205 Okl. 618, 239

P. 2d 754; if the conditions for exclusion exist, 45 C. J. S. Insurance § § 827 and 829.

The facts are undisputed that the insured, Jones, neither owned nor rented the premises upon which the accident occurred, but merely rented his truck and driver to Kiespert & Shoaf, the drilling contractors who owned the rig being set up by Jones' driver, and who controlled and directed the driver in the use of the truck with the winch-line on the premises. Without doubt, therefore, the locale of the exclusionary provision is conclusively met.

The final question, then, is whether the vehicle which caused the accident was an "automobile", finally excluding National Surety's liability under its policy. By concise definition in the policy, the word "automobile" is a "land motor vehicle". Within that same definition a "power crane" is not deemed to be an automobile "except while towed by or carried on a motor vehicle" described as not falling within the category of excepted vehicles.

This vehicle easily comes within the definition of a "land motor vehicle". Its self-propelling features upon the public highways and adjacent territories, where it was operated under license from the State, bring it within the generic word "automobile". See *Washington Nat.*

Ins. Co. v. *Burke*, 258 S. W. 2d 709, (Ky.); *Hoover* v. *National Casualty Co.*, 236 Mo. App. 1093, 162 S. W. 2d 363, 364; *City of Dayton* v. *DeBrossi*, 62 Ohio App. 232, 23 N. E. 647, 650. The vehicle, as an automobile, was actually in motion at the time of the accident, its motive power being utilized for moving a kelly head from one place to another. This vehicle is commonly characterized as a winch-truck. And by its very nature, the hoisting apparatus, or crane used in connection therewith, including the gin poles, winch and winch lines and related equipment, is attached to and carried on the winch truck. This characteristic automatically brings the truck, together with its attachments for crane purposes within the contractual definition of "automobile."

Obviously a winch truck, even if used as a "mobile crane", which the facts show it was not, is still a truck; and cannot, by calling it by another name, be transformed into a crane, ignoring its basic characteristics as a truck, to impose risks contractually excluded.

On the question of coverage within petitioner's policy, the lifting of another truck from a creek bed by insured's truck in the *Duke Anderson case*, determined not to be "transportation of merchandise or freight" within the terms and scope of the policy, is clearly distinguishable from the hauling of heavy oil field equipment upon an oil lease in the rigging up process. Whether Jones was

hauling the equipment over the public highways or within the limited scope of an oil lease, such operations constituted the hauling or transporting of the merchandise, or freight, or stock in trade in which insured, Jones, was engaged. Under such circumstances, both the trial court and the United States Court of Appeals for the Tenth Circuit properly concluded that such movement constituted transportation of merchandise within the meaning of the policy.

It seems obvious that the Oklahoma Court in the *Duke Anderson case* was impressed with the fact that a truck did not constitute merchandise or freight within the terms of the policy, and not whether the actual movement from the ditch to the road constituted transportation. Therefore, it may not be said that the question of what constitutes "transportation" as such was considered important by the Oklahoma Court.

To further substantiate the meaning of "transportation of merchandise" within petitioner's policy to include the operation of hauling oil field equipment upon an oil lease, the Court may properly look to the intent of the parties in entering into the insurance contract. *U. S. Fidelity & Guaranty Co.* v. *Doheny*, 123 F. 2d 746, affirming *Doheny* v. *U. S. Fidelity & Guaranty Co.*, 34 F. Supp. 888, *cert.* den., 62 S. Ct. 905, 315 U. S. 817, 86 L. Ed. 1215; *Pilgrim Laundry & Dry Cleaning*

Co. v. *Federal Ins. Co.*, 140 F. 2d 191, affirming *Federal Ins. Co.* v. *Pilgrim Laundry & Dry Cleaning Co.*, 50 F. Supp. 577. From the testimony of the common agent who issued both petitioner's and respondent's policies, it is very apparent that Jones, the insured, intended to procure coverage from petitioner for his automobiles and trucks in operations upon other premises, not under his control; that he paid premiums, which were accepted by petitioner, which were based upon gross earnings of the insured, without distinction between highway hauling and lease work. It is equally apparent that he intended to, and did, procure coverage from respondent for risks involved and incident to ownership and operation of his premises. The premium basis thereon was the payroll, excluding truck drivers.

CONCLUSION

The Oklahoma case of *Duke Anderson Drilling Co.* v. *Smith*, 193 Okl. 107, 141 P. 2d 565, in no way controls the decision in the case at bar. The petition for *certiorari* should be denied.

Respectfully submitted,

CLYDE J. WATTS,
LOONEY, WATTS,
LOONEY & NICHOLS,
760 First National Building,
Oklahoma City, Oklahoma,
Attorneys for Respondent,
National Surety Corporation.

FEBRUARY, 1957.